

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARTHA DAVIS, *et al.*,

Plaintiffs,

VS.

CAPITOL RECORDS, LLC, *ET AL.*

Defendants.

Case No.: 12-cv-1602 YGR

**ORDER GRANTING IN PART AND DENYING IN
PART MOTION TO DISMISS**

Plaintiff Martha Davis (“Davis”) brings this action as a member of the music group, “The Motels,” and a shareholder, beneficiary, and/or successor-in-interest of the now-dissolved The Motels Music Corporation, Inc. She brings the instant complaint alleging a nationwide class action for breach of standard recording contracts and for statutory violations of California law against Defendant Capitol Records, LLC (“Capitol”).¹ Davis alleges that Capitol failed to account properly for royalties stemming from the licensing of musical performances or recordings produced by Davis and putative class members under contract with Capitol, which were then were utilized by digital content providers, such as music download providers, music streaming providers, and ringtone providers, for digital download, streaming and distribution.

The parties are before the Court on Capitol's motion to dismiss the Second Amended Class Action Complaint (“SAC”) for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure and to strike certain allegations pursuant to Rule 12(f). The parties briefed the

¹ Defendants EMI Group Limited and EMI Group, Inc. were voluntarily dismissed by Plaintiff on March 12, 2013. (*See* Dkt. No. 67.)

1 matter and the Court heard oral argument on October 2, 2012. The parties thereafter submitted
2 supplemental briefing as requested by the Court at the hearing.

3 Having carefully considered the papers submitted and the pleadings in this action, and for the
4 reasons set forth below, the Court hereby Orders that the Motion to Dismiss and to Strike Certain
5 Allegations is **DENIED IN PART AND GRANTED IN PART, WITHOUT LEAVE TO AMEND.**

6 **I. SUMMARY OF ALLEGATIONS**

7 Davis alleges claims for breach of contract, declaratory judgment, open book account, breach
8 of the covenant of good faith and fair dealing, and unfair competition. All claims arise from
9 allegations that Capitol failed to pay royalties under the contracts between Capitol and The Motels
10 Music Corporation, Inc. (SAC ¶¶ 133-163.) She alleges that under the contracts, Capitol was
11 required to pay a certain royalty for record (or “phonorecord”) sales, and a higher royalty for a
12 “license” of “masters.” (SAC ¶¶ 69-92.) Davis claims that Capitol improperly treated the sale of the
13 group’s recordings through digital content providers as a “phonorecord sale” instead of a “license.”
14 (SAC ¶ 92.) According to Davis, Capitol should have treated such sales differently for royalty
15 purposes, because Capitol allegedly “licenses” “masters” to digital content providers for permanent
16 downloads. (SAC ¶ 91.)

17 **II. STANDARDS APPLICABLE TO THE MOTION**

18 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims
19 alleged in the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003).
20 Review is generally limited to the contents of the complaint. *Allarcom Pay Television, Ltd. v.*
21 *Gen. Instrument Corp.*, 69 F.3d 381, 385 (9th Cir. 1995). All allegations of material fact are
22 taken as true. *Erickson v. Pardus*, 551 U.S. 89, 93, 94 (2007). However, legally conclusory
23 statements not supported by actual factual allegations need not be accepted. *See Ashcroft v.*
24 *Iqbal*, 556 U.S. 662, 679 (2009). “When the allegations in a complaint, however true, could not
25 raise a claim of entitlement to relief,” dismissal is appropriate. *Bell Atl. Corp. v. Twombly*, 550 U.S.
26 544, 558 (2007). Thus, a motion to dismiss will be granted if the complaint does not proffer
27 enough facts to state a claim for relief that is plausible on its face. *See id.* at 558-59.

III. DISCUSSION

A. Request for Judicial Notice

Capitol argues that the Court should take judicial notice of the agreements referenced in the SAC, which are attached to Defendant's Request for Judicial Notice. (Dkt. No. 57.) When a complaint specifically refers to a document, the document or its terms are central to the allegations, and no party questions its authenticity, the court may properly consider the document in ruling on a motion to dismiss. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). Here, the agreements are central to the allegations of the complaint. Thus the Court finds it appropriate to take judicial notice of them for purposes of this motion.

B. Limitation of Claims

Capitol first argues that Davis's claims are barred to the extent she seeks royalties for more than three years prior to the filing of this lawsuit, since the terms of the agreement provide for a three-year contractual limitations period. Davis's contracts with Capitol all required that, unless written notice is provided to Capitol within a specified number of years (first three, later four years), royalty statements "shall be final, conclusive and binding." (See SAC ¶¶ 113-114.) Capitol argues Davis did not allege she made any objection to the royalty statements at issue, but now seeks relief for underpayment of royalties going back more than three years prior to the filing of the complaint.

Capitol's arguments do not support dismissal, or partial dismissal of the claims. The allegations here arguably support a basis for tolling of the contractual limitations period. First, "[r]esolution of the statute of limitations issue is normally a question of fact." *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th 797, 806-07 (2005). "A motion to dismiss based on the running of the statute of limitations period may be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Supermail Cargo v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995)) (internal quotation omitted). Second, where the allegations of the complaint indicate that plaintiff was prevented from learning the true facts by defendant's misrepresentations or concealment, application of the delayed discovery rule is particularly appropriate. See *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1040 (9th Cir. 2003)

1 (franchisees prevented from learning of breach of agreements by defendant's misrepresentations and
2 forgery); *Weatherly v. Universal Music Group*, 125 Cal.App.4th 913 (2004) (contractual limitations
3 provision tolled where songwriter did not learn of breach of royalty contract due to music publisher's
4 misrepresentations). Under California law, a plaintiff need not plead deliberate concealment, but
5 must simply offer facts to show that: "[t]he injury or the act causing the injury, or both, have been
6 difficult for the plaintiff to detect"; "the defendant has been in a far superior position to comprehend
7 the act and the injury"; and "the defendant had reason to believe the plaintiff remained ignorant he
8 had been wronged." *Gryczman v. 4550 Pico Partners, Ltd.*, 107 Cal. App. 4th 1, 5-6 (2003) *quoting*
9 *April Enterprises, Inc. v. KTTV*, 147 Cal.App.3d 805, 831 (1983).

10 Here, Davis alleges that Capitol knowingly underpaid her and other class members by
11 reporting digital download licenses as sales of physical record sales, and concealed the fact that
12 Capitol improperly accounted for sales. (SAC ¶ 116.) She further alleges that breaches of contracts
13 were difficult if not impossible to detect based only on the royalty statements, since simply moving
14 licenses from one category and reporting them in another would be a serious breach but would not be
15 readily perceivable. (SAC ¶ 117.) Davis alleges that the royalty statements she received were
16 misleading and did not put her on notice that Capitol was actually licensing digital masters to third-
17 parties while reporting those earnings at the "records sold" rate rather than the "masters licensed"
18 rate. (See SAC ¶¶ 116, 117.) Thus, Davis has pleaded a basis for tolling the contractual limitations
19 period based upon delayed discovery.

20 The case law cited by Capitol is distinguishable. Unlike *Gutierrez v. Mofid*, 39 Cal. 3d 892,
21 899 (1985), the facts here do not present a situation in which Davis knew of her injury but failed to
22 file suit because she was dissuaded by professional advice that she had no claim. Likewise, in
23 *Matsumoto v. Republic Ins. Co.*, 792 F.2d 869, 872 (9th Cir. 1986), plaintiffs knew of and made a
24 claim to their insurance company, but failed to sue after the insurance company denied that claim.

25 Capitol argues that Davis must not only allege a basis for the delayed discovery rule, but also
26 that she could not have discovered that basis earlier despite reasonable diligence. Capitol contends
27 that Davis was not reasonably diligent in bringing her claims since she did not exercise her
28

1 contractual right to audit her royalty statements. First, this argument assumes facts not before the
 2 Court. On a motion to dismiss, a court cannot consider matters beyond the pleadings and documents
 3 properly subject to judicial notice. *Supermail Cargo*, 68 F.3d at 1206. Second, even in the face of a
 4 failure to exercise her audit rights, a finding of lack of diligence cannot be assumed since Davis
 5 alleges that she was hindered from acting any earlier due to the defendant's misrepresentations and
 6 concealments. *See Weatherly*, 125 Cal.App.4th at 920 (reversing trial court's finding that claims
 7 were barred for lack of diligence in exercise of audit rights).

8 Accordingly, the motion to dismiss on limitations grounds is **DENIED**.

9 **C. Declaratory Relief Claim**

10 Capitol moves to dismiss Davis's claim for declaratory relief as duplicative of her claim for
 11 breach of contract. Declaratory relief is meant to resolve uncertainties and disputes that may lead to
 12 future litigation. *See U.S. v. Washington*, 759 F.2d 1353, 1356-57 (9th Cir. 1985). The existence of
 13 another adequate remedy does not preclude a declaratory judgment. Fed. Rules of Civ. Proc. 57; 28
 14 U.S.C. § 2201. As the Advisory Committee comments to Rule 57 indicate, pleading a claim for
 15 declaratory relief as an alternative or cumulative remedy does not render it inappropriate. *See*
 16 *Tierney v. Schweiker*, 718 F.2d 449, 457 (D.C. Cir. 1983) (citing Advisory Committee comments).
 17 However, courts have dismissed companion claims for declaratory relief where the breach of
 18 contract claims resolved the dispute completely and rendered additional relief inappropriate. *See*
 19 *StreamCast Networks, Inc. v. IBIS LLC*, CV05-04239MMM (EX), 2006 WL 5720345 (C.D. Cal.
 20 May 2, 2006) (citing numerous cases).

21 Here, the Court cannot determine, as a matter of law, that declaratory relief would be
 22 duplicative or otherwise inappropriate such that it should be dismissed at the pleading stage. Davis
 23 alleges claims for herself and on behalf of a class of similarly situated persons. She alleges that the
 24 declaratory relief claim is for a determination that "the pertinent recording agreements obligate EMI
 25 to pay and/or credit Davis and other class members the percentage specified for licensing, rather than
 26 for sales, when EMI licenses the master recordings of Plaintiff and other Class members to Digital
 27
 28

1 Content Providers.” (SAC ¶ 143.) Thus, it is not clear that resolution of the breach of contract claim
2 would render the need for declaratory relief unnecessary.

3 Capitol argues that the district court’s decision in *Kho v. Wells Fargo & Co.*, SACV 12-0847
4 DOC, 2012 WL 3240041 (C.D. Cal. Aug. 6, 2012) dictates a different result. The court there
5 dismissed a claim for declaratory relief as “superfluous and unnecessary” in the context of
6 dismissing all other claims on their merits, with prejudice. *Id.* at *9. Here, Davis has alleged facts to
7 support her contract claim. Alleging a declaratory relief claim based upon the same facts is not
8 inappropriate.

9 The motion to dismiss the declaratory relief is, therefore, **DENIED**.

10 **D. Implied Covenant of Good Faith and Fair Dealing**

11 Capitol moves to dismiss Davis’s fourth claim for breach of the implied covenant of good
12 faith and fair dealing on the grounds that it is duplicative of her breach of contract claim. The Court
13 disagrees.

14 The covenant of good faith and fair dealing, implied by California law in every contract,
15 exists to prevent one contracting party from unfairly frustrating the other party’s right to receive the
16 benefits of the agreement. *Guz v. Bechtel Nat’l, Inc.*, 24 Cal.4th 317, 349 (2000). “The covenant is
17 implied as a supplement to the express contractual covenants, to prevent a contracting party from
18 engaging in conduct that frustrates the other party’s rights to the benefits of the agreement” even if it
19 does not technically violated the express terms of the agreement. *Waller v. Truck Ins. Exch.*, 11
20 Cal.4th 1, 36 (1995). Thus, where a contracting party had an obligation to deal fairly with its
21 contracting partner in calculating license fees, it violated that duty by using a method that unfairly
22 undervalued fees owed even if there was no express contractual obligation to calculate them
23 differently. *Ladd v. Warner Bros. Entm’t, Inc.*, 184 Cal. App. 4th 1298, 1308 (2010) (breach of the
24 implied covenant of good faith and fair dealing established where movie studio used a straight-lining
25 method instead of considering relative worth in licensing packages). A claim for breach of the
26 implied covenant of good faith and fair dealing is not duplicative of a breach of contract claim when
27 a plaintiff alleges that the defendant acted in bad faith to frustrate the benefits of the alleged contract.

1 *See Celador Internat'l Ltd. v. The Walt Disney Co.*, 347 F.Supp.2d 846, 853 (C.D.Cal. 2004) (citing
2 *Guz*, 24 Cal.4th at 353 n. 18); *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371,
3 1395 (1990) (refusal to discharge contractual responsibilities which unfairly frustrates the agreed
4 common purposes and reasonable expectations of the other party constitutes claim for breach of good
5 faith and fair dealing, whether or not it also constitutes breach of a consensual term).

6 Here, Davis has alleged that Capitol's conduct of improperly accounting for the monies owed
7 to Davis and the class breached the implied covenant of good faith and fair dealing, and that this was
8 conduct deprived her of the benefits of the contract. (SAC ¶¶ 151-154.) She alleges that Capitol
9 knowingly underpaid her by reporting digital download licenses as physical record sales, and
10 concealed the fact that it improperly accounted for those sales. (SAC ¶¶ 116-119.) She also alleges
11 that Capitol vetted the policy of mischaracterizing the sales and decided to adopt the policy to avoid
12 its contractual obligations in favor of higher profits, which at the same time characterizing its
13 agreements with digital music providers as being "in the interest of its recording artists." (SAC ¶
14 93.) These allegations are sufficient to state a claim separate and distinct from her breach of contract
15 claim.

16 **E. Unfair Competition Claim**

17 Davis alleges her claim for violation of California Business & Professions Code section
18 17200, California's Unfair Competition Law ("UCL"), based upon all three prongs of the statute –
19 that is, unfair, unlawful, and fraudulent conduct. Capitol seeks to dismiss the claim to the extent it is
20 based upon either unlawful or fraudulent conduct.

21 *1. Fraudulent Prong*

22 As to the fraudulent prong, Capitol argues that Davis has not alleged fraud with sufficient
23 particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure. Capitol argues that,
24 because the claim is based upon fraud, Davis must set forth the "who, what, when, where, and how
25 of the misconduct alleged." *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126–27 (9th Cir. 2009).
26 Furthermore, since Davis allege fraud against a corporation, she "must allege the names of the
27 persons who made the allegedly fraudulent representations, their authority to speak, to whom they
28

1 spoke, what they said or wrote, and when it was said or written.” *Lazar v. Sup. Ct.*, 12 Cal. 4th 631,
2 645 (1996) (internal quotation marks omitted).

3 Davis argues that she has alleged the fraud here with sufficient specificity to permit Capitol
4 to answer. The SAC alleges that Capitol: contrived a method of accounting for licensing income that
5 knowingly applied incorrect formulas for calculating royalties in its accounting statements to Davis
6 (SAC ¶¶ 8, 91-92); approved this policy and practice in order to reap profits by avoiding its
7 contractual obligations (SAC ¶ 158); and yet repeatedly made statements designed to lead members
8 of the public into believing that its accounting practices were meant to benefit Davis and the other
9 artists owed royalties (*id.*). Thus, the SAC alleges that Capitol knowingly breached its agreements
10 and employed devices to conceal these facts from Davis and other class members in order to deprive
11 them of monies owed to them. (SAC ¶¶ 116-119, 158.) Davis and the class were led to believe that
12 the royalty rates paid accurately reflected the amounts actually owed to them and accurately
13 accounted for the nature of Capitol’s agreements with its third-party vendors. (SAC ¶¶ 92-93.)

14 Davis further argues that the Court should apply the more relaxed standard appropriate to
15 fraud-based claims in which the specific facts as to who engaged in the misleading conduct are
16 peculiarly within the control of defendants, citing *Neubronner v. Milken*, 6 F.3d 666, 671-73 (9th
17 Cir. 1993). Capitol protests that this exception should not apply because Davis’s allegations as to
18 Capitol’s knowledge of the fraud are only on information and belief. However, Rule 9(b) is clear
19 that the heightened pleading requirements apply only to the circumstances constituting the fraud.
20 “Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.” Fed.
21 Rules Civ. Proc. 9.

22 Davis’s allegations regarding the circumstances of the fraud here are sufficiently particular.
23 The facts as to who made the decisions regarding the alleged misleading royalty statements are facts
24 peculiarly within the control of Capitol. Davis’s general allegation of Capitol’s knowledge is
25 permissible.

26 //

27 //

2. *Unlawful Prong*

As to the unlawful prong, Capitol argues that Davis has not identified any specific law or regulation allegedly violated, but merely relies on the same allegations as her breach of contract claim. However, common law theories can establish a predicate “unlawful” act for purposes of the UCL. *See Cmty. Assisting Recovery, Inc. v. Aegis Sec. Ins. Co.*, 92 Cal.App.4th 886, 891 (2001) (“an ‘unlawful’ business practice . . . [under the UCL] is one that violates an existing law, *including case law*”); *Mercado v. Allstate Ins. Co.*, 340 F.3d 824, 828 n. 3 (9th Cir. 2003) (“California courts have not foreclosed common law theories as a basis for actions pursuant to [the UCL]”); *Gabana Gulf Distribution, Ltd. v. Gap Int’l Sales, Inc.*, 2008 WL 111223, at *10 (N.D. Cal., Jan. 9, 2008) (noting that “[a]lthough the state of § 17200 jurisprudence is in rapid flux, California courts have not yet foreclosed common law theories – such as breach of the covenant of good faith – as a basis for actions pursuant to § 17200.”). Where, as here, the complaint alleges systemic conduct meant to breach the terms of, or deny the benefits of, agreements between the defendant and a group of similarly situated parties, it is sufficient state a claim for an unfair business practice in violation of the UCL. *See James v. UMG Recording, Inc.*, 2011 WL 5192476, *4-5 (N.D. Cal. Nov. 1, 2011) (“the Court finds that plaintiffs have alleged more than just a breach of contract because the complaints allege that UMG engaged in a broad scheme to underpay numerous royalty participants”); *see also CRST Van Expedited, Inc. v. Werner Enterprises, Inc.*, 479 F.3d 1099, 1107 (9th Cir. 2007) (UCL claim based on unlawful prong alleged based upon common law intentional interference with employment contracts).² The facts alleged here support a claim under the UCL’s unlawful prong.

² *Sybersound Records*, cited by Capitol, is distinguishable. There, the plaintiff sought to base its claim for violation of the UCL based upon contracts to which it was not a party, but instead were agreements “among sophisticated parties who are not all parties to this lawsuit.” *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1153 (9th Cir. 2008). As the Ninth Circuit there noted, a “breach of contract may form the predicate for a section 17200 claim, provided it also constitutes conduct that is unlawful, or unfair, or fraudulent.” *Id.* at 1152 (internal quotation and citation omitted). The court’s decision turned on the standing issues raised by the posture of the case more than whether the underlying violation was contractual in nature.

1 The motion to dismiss the UCL claim is **DENIED**.

2 **F. Punitive Damages**

3 Capitol also seeks to eliminate Davis's claim for punitive damages in connection with her
4 claim for breach of the covenant of good faith and fair dealing.³ California law does not allow
5 recovery of tort damages for contract-based claims except "in limited circumstances, generally
6 involving a special relationship." *Diaz v. Fed. Express Corp.*, 373 F. Supp.2d 1034, 1066 (C.D. Cal.
7 2005). "Because the covenant of good faith and fair dealing essentially is a contract term that aims
8 to effectuate the contractual intentions of the parties, 'compensation for its breach has almost always
9 been limited to contract rather than tort remedies.'" *Spinks v. Equity Residential Briarwood*
10 *Apartments*, 171 Cal. App. 4th 1004, 1054 (2009) (quoting *Cates Construction, Inc. v. Talbot*
11 *Partners* 21 Cal.4th 28, 43 (1999).) The lone exception recognized by the California Supreme Court
12 to date is for tort damages arising from bad faith breach of an insurance contract. *See Cates*
13 *Construction*, 21 Cal. 4th at 43 (1999); *see also Spinks*, 171 Cal. App. 4th at 1054 ("breach of the
14 implied covenant of good faith and fair dealing will not give rise to punitive damages" in
15 "noninsurance cases").

16 Davis concedes that, under California law, punitive damages generally are not available on a
17 claim for breach of the covenant outside the insurance context, but argues that the limited exception
18 should be extended here because the relationship between recording artists and record companies is
19 sufficiently similar to the relationship between insureds and their insurers. While Davis has stated a
20 claim for breach of the covenant of good faith and fair dealing, her arguments for extending
21 California law on punitive damages past the line clearly drawn in *Spinks* are not persuasive.

22
23
24
25 ³ Capitol moves either to strike the punitive damages claim under Rule 12(f) or to dismiss it
26 under Rule 12(b)(6). The Ninth Circuit has made plain that a court cannot strike certain damages
27 under Rule 12(f) based upon an argument that they are precluded by law, but has endorsed
28 dismissing them under Rule 12(b)(6) when appropriate. *Whittlestone, Inc. v. Handi-Craft Co.*, 618
F.3d 970, 974 (9th Cir. 2010). Thus the Court determines this issue under Rule 12(b)(6).

1 The motion is therefore **GRANTED WITHOUT LEAVE TO AMEND** as to the punitive damages
 2 request.⁴ The request for punitive damages, paragraph 167 of the SAC, is **DISMISSED**.

3 **G. Motion to Strike Quoted Portion of *ReDigi* Complaint**

4 Paragraph 99 of Davis's SAC quotes a portion of a complaint filed in the Southern District of
 5 New York, *Capitol Records, LLC v. ReDigi, Inc.*, No. 1:12-cv- 00095-RJS (S.D.N.Y. Jan. 6, 2012)
 6 ("*ReDigi*"). Defendant argues that Davis has misquoted the complaint in a way that alters its
 7 meaning and that the statement should be stricken as "immaterial, impertinent, [and] scandalous"
 8 under FRCP 12(f).

9 Davis's SAC alleges this portion of the *ReDigi* complaint to establish inconsistencies in
 10 Capitol's position on the allegations in the SAC. In *ReDigi*, Capitol alleges that digital downloads
 11 received by consumers are not phonorecords for purposes of reselling them consistent with the first
 12 sale doctrine of the U.S. Copyright Act, 17 U.S.C. § 109. (SAC ¶¶ 98, 99.) Yet, with respect to
 13 Davis and others, Capitol treats digital downloads as sales of phonorecords for royalty purposes.
 14 The actual text of Capitol's *ReDigi* complaint read:

15 . . . Plaintiff also distributes and licenses its sound recordings in the form of
 16 digital audio files, which are marketed and distributed online, and delivered to
 17 consumer via the Internet. Legitimate avenues for the digital distribution of
 18 music exist through authorized services, such as Apple's iTunes and Amazon's
 MP3 Music Service, which provide these sound recording for consumers pursuant
 to agreements that the services negotiated with Plaintiff.

19 Davis purported to quote that same language as follows:

20 "Plaintiff also redistributes and *licenses* its sound recordings in the form of digital
 21 audio files, which are marketed and distributed online and delivered to the

22 ⁴ Plaintiff notes that other states permit punitive damages for breach of contract in a wider
 23 variety of situations. *See, e.g., Clarendon Mobile Home Sale, Inc. v. Fitzgerald*, 381 A.2d 1063,
 1065 (Vt. 1977) (where "breach has the character of a willful and wanton or fraudulent tort"); *Boise*
 24 *Dodge, Inc. v. Clark*, 453 P.2d 551, 553-56 (Idaho 1969) (where there is "fraud, malice, oppression
 25 or other sufficient reason"); *Perry v. Green*, 437 S.E. 2d 150, 152 (S.C. Ct. App. 1993) (when the
 26 breach of contract is accompanied by a fraudulent act such as "any act characterized by dishonesty in
 27 fact, unfair dealing, or the unlawful appropriation of another's property by design."). The Court's
 28 decision to dismiss the punitive damages claim based on the current allegations of the SAC is
 without prejudice to some future showing that the applicable law would permit Plaintiff to amend to
 include such a claim for relief.

1 consumer via the Internet through, inter alia, iTunes and Amazon.” (Emphasis
2 added.)

3 (SAC ¶ 99.) While it is clear that Davis did not directly and accurately quote the
4 language from the *ReDigi* complaint, the error does not change the meaning of the
5 *ReDigi* allegations in any significant way. The Court does not condone Davis’s
6 misquotation, but neither does it find the allegation “immaterial, impertinent, or
7 scandalous” as set forth in Rule 12(f). The motion to strike is therefore **DENIED**.

8 **CONCLUSION**

9 The motion to dismiss is **GRANTED** as to the request for punitive damages only, and is
10 otherwise **DENIED**. The motion to strike paragraph 99 is **DENIED**. Capitol shall file and serve its
11 answer to the SAC no later than May 10, 2013.

12 **IT IS SO ORDERED.**

13 DATE: April 18, 2013

14 
15 YVONNE GONZALEZ ROGERS
16 UNITED STATES DISTRICT COURT JUDGE
17
18
19
20
21
22
23
24
25
26
27
28